INDEX

	Page
BACKGROUND	6
ARGUMENT	7
CONCLUSION	11

TABLE OF AUTHORITIES

Table of Cases

Dawson v. McMillan, 84 Wash. 269, 75 Pac. 807 (1904) ... 9

Doemel v. Jantz, 180 Wis. 225, 193 N.W. 393 (1923) ... 10

Hill v. Newell, 86 Wash. 227, 149 Pac. 951 (1915) ... 9, 10

Hughes v. Washington, 389 U.S. 290 (1967) ... 7

Nelson v. DeLong, 213 Minn. 425, 7 N.W.2d 342 (1942) ... 10

New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735 (1901) ... 7

People v. California Fish Co., 166 Cal. 576, 138 Pac. 79 (1913) ... 10

Shively v. Bowlby, 152 U.S. 1 (1894) ... 10

State v. Malmquist, 114 Vt. 96, 40 A.2d 534 (1944) ... 10

Ward v. Mulford, 32 Cal. 365 (1867) ... 10

Wilbour v. Gallagher, 77 Wash. Dec. 2d 307, 462 P.2d 214 (1969) ... 6

Wilson v. Blackbird Creek Marsh Co., 27 U.S. (2 Peters) 245 (1829) ... 10

Other Authority

Washington State Constitution, Art. XVII § 1 ... 8, 9

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1970

No. 492

NORMAN C. GALLAGHER and
RUTH I. GALLAGHER,
husband and wife,

Petitioners,

v.

CHARLES S. WILBOUR and
HARRIET G. WILBOUR, his wife;
and CHESTER L. GREEN and
RUBY GREEN, his wife;
on behalf of themselves and all other residents
and property owners of the Town of Chelan,
State of Washington, and all other members of
the general public similarly situated,

Respondents.

BRIEF AMICUS CURIAE OF THE STATE OF WASHINGTON IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The Attorney General, on behalf of the State of Washington, its Governor—the Honorable Daniel J. Evans, and its Departments of Ecology, Fisheries, and Game, submits this Brief Amicus Curiae in opposition to the petitioners' Petition for a Writ of Certiorari pursuant to Rule 42(4) of the Court.

BACKGROUND

The State of Washington was not a party to this case in the Washington Supreme Court, *Wilbour v. Gallagher*, 77 Wash. Dec. 2d 307, 462 P.2d 214 (1969), because the Attorney General was not advised of its pendency until after all briefs had been filed with the Supreme Court.

After the Washington Supreme court's decision was issued, on December 4, 1969, the petitioners submitted a petition for rehearing. Thereafter the Court called for an answer to the petitioners' petition for rehearing and granted permission to various individuals and entities to submit briefs amicus curiae. Dates for filing these briefs, both in support of and opposition to petitioners' petition for rehearing, were extended; the latest date for those filing brief in opposition being April 9, 1970.

The Attorney General filed an amicus curiae brief, opposing the petition for rehearing, on behalf of the State of Washington, its Governor—the Honorable Daniel J. Evans, the Washington State Departments of Fisheries and Water Resources, the Washington State Game Commission and the Washington State Water Pollution Control Commission. (A second brief in opposition to the petition was filed on behalf of 16 individuals and organizations.)

Six amicus curiae briefs in support of the petition for rehearing, totaling more than 240 pages, were filed.

On May 7, 1970, the petition for rehearing was denied by the Washington Supreme Court.

ARGUMENT

The only federal question asserted by petitioners is that the Washington Supreme Court decision deprived defendants of their property without due process of law.[1] Petitioners invoke the principle stated in the concurring opinion of the United States Supreme Court in *Hughes v. Washington*, 389 U.S. 290 (1967), where Mr. Justice Stewart said that the Washington Supreme Court's decision, reversed in that case, involved an unconstitutional taking because the Washington Supreme Court had sharply departed from prior Washington decisional law.

We do not quarrel with that principle but it is wholly inapplicable to the present case because prior Washington law, now relevant, supports the result which the Washington court reached.

Twelve years after statehood, the Washington Supreme Court, in *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735 (1901), wrote:

> "The title to lands under tide waters in the sea, arms, and inlets thereof, and in tidal rivers, within the realm of England, was, by the com-

[1] The non-meritorious argument advanced below by the petitioners in their petition for rehearing that state law relating to navigational rights was inapplicable to Lake Chelan because it is "navigable waters of the United States" has been abandoned.

mon law, deemed to be vested in the king, as a public trust, to subserve and protect the public right to use them as a common highway for commerce, trade, and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property; but his grant was subject to the paramount right of the public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right. Upon the American Revolution the title and dominion of the tide waters, and of the lands under them, vested in the several states of the Union within their respective borders, subject to the right surrendered by the constitution to the United States. The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. [Citations omitted.] . . . The provision of Art. 17, § 1, of the constitution was evidently for the purpose of establishing the right of the state to the beds of all navigable waters in the state, whether lakes or rivers, or fresh or salt, to the same extent the crown had in England in the sea, and in the arms and inlets thereof, and in the tidal rivers, and to eliminate the distinctions existing under the rule of the common law in this respect." 24 Wash. at 499-500, 64 Pac. at 737-738.

---

*Art. XVII § 1 of the Washington State Constitution provides:

"The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from

In the same opinion the court went on to describe the rights of the state in a navigable lake as "the right to use, regulate, and control these waters as a common highway for commerce, trade, and intercourse, and to grant the soil in the bed of the lake so that it might become private property, subject to the paramount right of public use for navigation." Id at 503, 64 Pac. at 738.

Three years later in *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807 (1904), the Washington Supreme Court held:

> "Being navigable water, when the state sold the bed thereof to the appellants, as stated in the finding No. 8, appellants took the title subject to the paramount right of the public to use the same for navigation. *Watkins v. Dorris, supra*, [24 Wash. 636, 64 Pac. 840] p. 644 [64 Pac. at 843]; *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R.A. 190. The fact, therefore, that the title of the bed of the channel, or the land upon which an obstruction is placed, is vested in the appellants, does not confer upon them the right to obstruct navigation upon navigable water. It is no doubt true that the sovereign authority may control and regulate the use of navigable waters, but it does not follow that an individual, over whose lands such waters flow, may do the same. *People v. St. Louis*, 5 Gilm. (Ill.) 351, 48 Am. Dec. 339. By the mere act of selling land to the appellants, the state conferred no right upon them to interfere with the rights of the public in the use of the highway." 34 Wash. at 274-75, 75 Pac. at 809.

See also the discussion of public rights in lands underlying navigable waters contained in *Hill v.*

---

asserting his claim to vested rights in the courts of the state."

Newell, 86 Wash. 227, 149 Pac. 951 (1915), quoting, with approval, from *People v. California Fish Co.*, 166 Cal. 576, 584, 138 Pac. 79, 82 (1913) and *Ward v. Mulford*, 32 Cal. 365, 372 (1867), as follows:

> "Such land is held by the state in trust and for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them her grantee takes them upon the same terms upon which she holds them, and, of course, subject to the public rights above mentioned,". . . . 86 Wash. at 231, 149 Pac. at 952.

Petitioners recognize that the states have always enjoyed wide latitude in shaping their own laws with respect to navigable waters. See *Shively v. Bowlby*, 152 U. S. 1 (1894), which is also cited at page 7 of petitioner's petition. Major limitations on that latitude occur where Congress has exercised its power under the commerce clause in an inconsistent manner. *Wilson v. Blackbird Creek Marsh Co.*, 27 U. S. (2 Peters) 245 (1829). No contention has been made by petitioner, and none can be made, that any exercise of federal authority has prevented the application of Washington law.

Discovery of an overriding federal question in this litigation would require like federal review and like treatment of the laws of many other states. See e.g.: *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393 (1923); *Nelson v. DeLong*, 213 Minn. 425, 7 N.W.2d 342 (1942); *State v. Malmquist*, 114 Vt. 96, 40 A.2d 534 (1944). In the petition for rehearing before the Washington Supreme Court, the present petitioners and amici curiae who sought rehearing joined in

criticism of the Washington Supreme Court's opinion because of its reliance on the laws of these sister jurisdictions, represented by these cases.

The Washington Supreme Court's decision has disposed of all issues of state law. No colorable federal question is presented.

CONCLUSION

On the basis of the foregoing the Petition for Writ of Certiorari under this Docket should be denied.

Respectfully submitted,

SLADE GORTON,
Attorney General of the State of Washington
CHARLES B. ROE, JR.
Assistant Attorney General
CHARLES W. LEAN,
Assistant Attorney General
MALACHY R. MURPHY,
Assistant Attorney General
CHARLES E. CORKER,
Special Assistant Attorney General
Attorneys for Amicus Curiae State of Washington

September, 1970